izens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

This decision is an important and far-reaching one, and may mark the beginning of a general movement among the courts to recognize the tort liability of water companies for fire losses due to insufficient water supply.

E. R. S.

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DIVERSION OF SUBTERRANEAN PERCOLATING WATERS.—That the qualification lately given to the law respecting the extent of the owner's right to divert subterranean waters percolating through his land is being widely accepted in this country is indicated by a clear opinion rendered in the recent case of *Pence et al.* v. *Carney et al.*, Nov., 1905, — W. Va. —, 52 S. E. Rep. 702. In this case the plaintiffs were owners of land on which was a spring of valuable mineral water, and an expensive hotel frequented for the purpose of enjoying its medicinal and curative effects. Defendants owned adjoining land and, seeking to compete with plaintiffs, sunk a well and obtained a like water. The operation of a large steam pump, placed in defendants' well resulted in a complete cessation of the flow on plaintiffs' premises. On appeal from the action of the circuit court in sustaining the demurrer to plaintiffs' bill for an injunction, it was held that all subterranean waters are presumed to be percolating waters and that the owner of land who explores for, and produces subterranean water within the boundary of his land, is limited to a reasonable and beneficial use of such water, when to otherwise use it would result in the depletion of the water supply of the neighboring or adjoining land.

Underground waters are presumed to be percolating waters until it is shown that they exist in a known and well defined channel. *Taylor* v. *Welch* (1876), 6 Ore. 198; *Ocean Grove Ass'n* v. *Com'rs of Asbury Park* (1885), 40 N. J. Eq. 447, 450, 3 Atl. Rep. 168. And they are not recognized as flowing in such channels unless known to so exist, or their existence is ascertainable from surface indications or other means, without sub-surface excavations for that purpose. *Taylor* v. *Welch,* supra; *Lybe's Appeal* (1884), 106 Pa. St. 626, 634, 51 Am. Rep. 542; *Black* v. *Billymena Comm'rs* (1886), 17 Ir. L. R. 459, 474. Applying these rules, the court held the waters in controversy to be percolating waters. Having thus established their nature, the Supreme Court of West Virginia adopted the common law rule as qualified in the last few years by many well reasoned cases. The court indicates that it is a rule not peculiar to any jurisdiction but one that is applicable to all. The earlier American and the present English rule is that the owner of the soil may use percolating waters at pleasure, although in so doing he may drain or entirely divert such waters from the lands of adjacent or neighboring owners to

which they would otherwise pass. In other words, that a landowner has no natural right whatever to the supply of water resulting from percolation through another's land. *Acton* v. *Blundell* (1843), 12 MEES. & W., 324, 2 GRAY'S CASES 104; *Chasemore* v. *Richards* (1859), 7 H. L. CAS. 349; *New Riv. Co.* v. *Johnson* (1860), 6 JURIST N. S. 374; *Ewart* v. *Belfast Guardians* (1881), L. R. 9 Ir. 172. *Wheatley* v. *Baugh* (1855), 25 Pa. St. 528, 64 Am. Dec. 721; *Chatfield* v. *Wilson* (1855), 28 Vt. (2 Williams) 49; *Frazier* v. *Brown* (1861), 12 Oh. St. 294, 19 L. R. A. 99; *Phelps* v. *Nowlen* (1878), 72 N. Y. 39, 28 Am. Rep. 93; *Bloodgood* v. *Ayers* (1885), 37 Hun 356; *Ocean Grove* v. *Asbury Park,* supra. And such is held to be the law in this country in a number of recent decisions: *Miller* v. *Black Rock Springs Co.* (1901), 99 Va. 747, 40 S. E. Rep. 27; *Huber* v. *Merkel* (1903), 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589. GOULD ON WATERS, sec. 280. (3rd Ed.) The tendency of recent cases, however, is to limit the owner to a reasonable and beneficial use of percolating water when the proper enjoyment of the adjacent and neighboring lands is liable to be interfered with. 30 Am. and Eng. Enc. of Law (2nd Ed.), 314; *Bassett* v. *M'f'g. Co.* (1862), 43 N. H. 569, 577, 82 Am. Dec. 179; *Smith* v. *City of Brooklyn* (1897), 46 N. Y. Supp. 141; *Forbell* v. *City of N. Y.* (1900), 164 N. Y. 522, 58 N. E. Rep. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; *Katz* v. *Walkinshaw* (1903), 141 Cal. 116, 70 Pac. Rep. 663, 99 Am. St. Rep. 66 (noted in 2 MICH. LAW REV. 403), *Stillwater* v. *Farmer* (1903), 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541, *Barclay* v. *Abraham* (1903), 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; *St. Amand* v. *Lehman* (1904), 120 Ga. 253, 47 S. E. Rep. 949. See FARNHAM, WATERS AND WATER RIGHTS, Vol. 3, p. 2717 et seq.

Previous to *Katz* v. *Walkinshaw,* supra, the common law doctrine of absolute and unqualified right in subterranean percolating waters was not questioned in those states where irrigation makes the subject of great importance. *Hansen* v. *McCue* (1871), 42 Cal. 303, 10 Am. Rep. 299; *Gould* v. *Eaton* (1896), 111 Cal. 639, 641, 44 Pac. 319, 52 Am. St. Rep. 201; *Willow Creek Irr. Co.* v. *Michael* (1900), 21 Utah 248.

Consistently with the rule that subsurface percolating waters belong absolutely to the owner of the land in which they are found, relief has been refused even where the diversion has been purely wanton and malicious. *Chatfield* v. *Wilson* (1855), 28 Vt. 49; *Frazier* v. *Brown* (1861), 12 Oh. St. 294; *Bradford* v. *Pickles* (1895), App. Cas. 587. But, in the words of *Bassett* v. *Co.,* supra, the injustice of the result when malice is present has led to an exception in several jurisdictions, that seems anomalous under the theory of absolute ownership they adopt.

The reasons repeatedly given for the old rule, are (1) that subterranean waters are so secret, changeable and uncontrollable that they cannot be subjected to the regulations of law, and that a system of rules such as has been applied to well defined streams, cannot be formulated without leading to irreconcilable conflict and confusion and (2) because such recognition of correlative rights would interfere with drainage, agriculture, mining and the progress of improvement generally.

However "secret, changeable and uncontrollable" percolating waters may

be, the effects of their unreasonable diversion have been but too apparent, as many of the cases cited above bear witness. And, as said in a well reasoned case on this subject, whether the deposition or detention of water in, or its removal from land is caused by a water-course, or by other means, can create ordinarily no difference in the effects of such deposition, detention or removal. It is believed that this objection is without sufficient force and merit to prevent interference by the courts in proper cases. "The courts can protect this particular species of property in water as effectually as water rights of any other description." *Katz* v. *Walkinshaw,* supra. Instead of involving the law of the subject in confusion and interfering with its application, the rule laid down is not only eminently just, but "exceedingly plain, certain, practical and easy to apply to real conditions." *Stillwater* v. *Farmer,* supra.

The second objection is based, apparently, on the assumption that if the property owner has not an absolute unfettered right, he has none at all. All courts recognize the rights of drainage, mining, agriculture, and all other rights of property in water, but a limit is sought to be imposed so that an owner may not unreasonably, or to no good purpose to himself, damage or deprive his neighbor of benefits he might otherwise enjoy. It is believed that a wise application of this qualification, where the facts demand, will facilitate the progress of improvement generally. Indeed, it seems to the writer that the conservation and prevention of waste sought in the cases laying down the doctrine here discussed have been rendered indispensable by the higher and greater demands of progress and improvement.

What is a reasonable use must depend, of course, on the facts of the particular case and the needs and business of the owner. *East* v. *Houston, etc., R. Co.* (Tex. Civ. App.). 77 S. W. 646. "It is not unreasonable that the owner should dig wells and take therefrom all the water he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve." *Forbell* v. *N. Y.,* supra. If the use is proper and reasonable, the old rule as unqualified, applies, and there is no liability for damages, however serious they may be. The injury is "damnum absque injuria." *Haldeman* v. *Bruckhart* (1863), 45 Pa. (9 Wright), 514, 84 Am. Dec. 511; *Lybe's Appeal,* supra.

"Percolating water is not an exception to the general rule that rights in organized society are not absolute, but correlative, and that one man cannot be permitted to exercise any right if the direct effect of his act will be an injury to his neighbor." The doctrine of correlative rights in percolating water is a sane one, and still another application of the old maxim: "Sic utere tuo ut alienum non laedas." D. G. E.

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WOMEN AS NOTARIES PUBLIC.—The Supreme Court of New Hampshire advises the Governor that a woman is not qualified under the laws of that state to fill the office of Notary Public (*In re Opinion of the Justices,* 62 Atl. Rep. 969). In *Ricker's Petition,* 66 N. H. 207, 29 Atl. Rep. 559, 24 L. R. A. 740, the court had held that a woman might be admitted to practice as an attorney-at-law on the ground that, although an attorney-at-law is an officer